IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1489 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

JAGANNATHBHAI GARBADBHAI JOSHI

Versus

KAMLABEN SHANTILAL PUROHIT

Appearance:

MR MTM HAKIM for Petitioners

MR PRABHAV A MEHTA for Respondent No. 1

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 04/05/2000

ORAL JUDGEMENT

The petitioners abovenamed have preferred this revision application under Sec.115 of the Code of Civil Procedure, 1908, challenging the order dated 7th September, 1999, recorded by the learned 8th Jt.Civil Judge (S.D.), Vadodara, below application Exh.18 in

Regular Civil Suit No.934 of 1998, under which the learned trial Judge dismissed the said application of the petitioners for amendment in the written statement under Order 6 Rule 17 of the C.P.C.

2. It appears from the record that, in the aforesaid civil suit by the respondent, the petitioners submitted their written statement, and in the said written statement, they have stated at about 5 to 6 places that they did not deny the facts stated in the particular paragraphs of the plaint. Now, the petitioners desire to say that the said averments made in the written statement were made inadvertently and out of typographical error and, therefore, the petitioners sought amendment in the written statement to the effect that whereever they have stated not denied it may be read as not admitted. The learned trial Judge dismissed the said amendment application and, therefore, the revision application has been filed.

3. I have heard learned advocates for the parties and have perused the papers. Now, it is very clear that the present petitioners have stated in the written statement Exh.11, that at six places they did not deny the fact stated in different paragraphs of the plaint. On the strength of the said averments in the written statement, learned advocate for the respondent has argued at length that, the petitioners have admitted several facts and therefore they would be estopped from dealing the same and this estoppel has resulted in a right creating in favour of the respondent and, therefore, such right could not be lightly to be taken by amending in the written statement. It has also been contended that the petitioners have not stated as to how the averments earlier made are wrong.

4. I have given thought to the aforesaid contention raised by the respondent. However, I am of the view that, while praying for amendment in the plaint or written statement, the parties concerned are not required to prove at this stage that the averments made earlier are wrong. The pleading is afterall pleading and the stage of the proof is yet to come and, therefore, it cannot be said that the petitioners were required to prove that the earlier pleading was incorrect. So far counter claim is concerned, I have gone through the amendment application in the written statement but, I could not find any counter claim made by the petitioners in any manner whatsoever. In the application for amendment in the written statement, the petitioners have not claimed any decree against the respondent and,

therefore, there is no counter claim sought by the petitioners by seeking amendment in the written statement. So far averments are concerned, it appears that, it is an error on the part of the petitioners in stating that the facts of the plaint in different paragraphs are not denied. It can be gathered from different paragraphs of the written statement that, after stating that the averments made in the plaint are not denied, the subsequent averments in the written statement go to show that there are totally inconsistent with the aforesaid so-called admission of the fact averred in the plaint. Therefore, initial so-called admission of fact in the plaint and subsequent averments in the written statement (unamended written statement) are totally inconsistent and, therefore, it can be said that initial statement in the written statement that they did not deny the facts stated in the plaint appears to have been made inadvertently.

5. It has been contended on behalf of the respondent that the written statement was filed on 12th August 1998, and the amendment was sought about 3 1/2 months after submission of the written statement. It is true that there is a gap of 3 1/2 months, but it so happens that after submission of written statement, the matter comes for issue and therefore the aforesaid aspect may not have come to the notice of the petitioners. Therefore the delay of 3 1/2 months cannot be taken to be a very serious one and it cannot work against the petitioners. It has also been argued that, in plaint para 2 of page 28 of the original written statement, the present petitioners have set out their counter claim. However, this is a part of original written statement and no amendment has been sought in respect of this part of written statement, therefore, it is not the subject matter of this revision application. It has also been contended that the petitioners may be at liberty to file application under Order 8 by way of counter claim and it is open to them and if they desire to do so they can make application under Order 8 of the CPC. But that is not the subject matter in this revision application and therefore that aspect cannot be considered. It has also been argued that the amendment was sought with a view to strengthen the counter claim. In fact it is not clear that whether the petitioners have paid court fees for counter claim. Moreover, as said above, the averments that the facts stated in the plaint are not denied appears to have been inadvertently made and therefore the amendment appears to be necessary.

6. Learned advocate for the respondent has relied

upon certain decisions. The first decision is in the case of Avadh Kishore Dass Vs. Ram Gopal and others reported in AIR 1979 S.C. p.861. There it has been observed that evidentiary admissions are not conclusive proof of the facts admitted and may be explained or shown to be wrong; but they do raise an estoppel and shift the burden of proof on to the person making them or his representative-in-interest. However, at the same time, as said above, the aforesaid averment that they did not deny the aforesaid facts of the plaint appear to have been made inadvertently and therefore at this stage it can be said that there is no question of estoppel.

6.1 Another decision of this High Court is in the case of Pari Kantilal Lalbhai Vs. Devchand Nathalal Patel reported in 1966 GLR page 1123. There it has been observed that admission in pleadings or in evidence at the hearing of the suit, those admissions are conclusive and cannot be challenged. However, here the amendment has been sought on the ground that the so-called admissions are made inadvertently and therefore the amendment has been sought. It, therefore, cannot be said that the admission made inadvertently as above would also be conclusive proof against the petitioners.

6.2 In M/s. Modi Spinning & Weaving Mills Co.Ltd and another Vs. M/s. Ladha Ram & Co. reported in AIR 1977 Supreme Court p.680, it has been observed that amendment introducing entirely different and new case and seeking to displace the plaintiff completely from admissions made by defendants in written statement and such application for amendment cannot be allowed. There is no dispute with the aforesaid principle. But here the point is that in some paragraphs they have mentioned that they did not deny the fact but in fact, they wanted to convey that they did not admit the fact. As said above, after making such so-called admission, the subsequent averments made in the written statement are against such admission and, therefore, it can be said that it was a matter of inadvertence and not a willful act on the part of the petitioners.

6.3 In Kantilal Hargovandas @ Sadhu Ramdasji Guru Ramsevakdas Vs. Maniramdasji Guru Narayandasji Ramanandi Sadhu and another reported in 1988(2) G.L.R. p.816 also similar view is taken. There it has been observed that Order 6 Rule 17 may be liberally allowed, but not an application under Order 8 Rules 6A to 6E - Where a petitioner propounds a Will of A and the caveator propounds another Will of A the caveator cannot be permitted to amend his pleading at a later stage so as to

enable him to set up a Will other than the one propounded by the petitioner it would amount to a counter claim. As said above, so far amendment in the written statement is concerned, it only relates admission or denial of a fact. However, as far as remaining averments made in the written statement are concerned, there is no change and those averments are already there in existence in the present written statement also. Therefore it cannot be said that the aforesaid decision will apply to the facts before us.

7. Under the aforesaid facts and circumstances of the case, I am of the view that the petitioners inadvertently said that they did not deny the facts stated in different paragraphs of the plaint. In fact they wanted to convey that they did not admit the same. This clearly appears to be an inadvertence on the part of the petitioners. Therefore the trial court ought to have allowed such amendment in the written statement. The trial court had jurisdiction to allow the application and since the order has been passed rejecting the amendment the said order has resulted in miscarriage of justice and it was prejudicely affect the right and interest of the petitioners and, therefore, it is necessary for this court to interfere in this revision application.

8. In the aforesaid view of the matter, the order of the trial court is illegal and it has resulted in miscarriage of justice therefore this revision application is allowed. The order passed by the trial court is set aside. The application of the petitioners for amendment in the written statement is allowed. The petitioners shall carry out the amendment in the written statement as prayed for. Rule is made absolute to the aforesaid extent. There shall be no order as to costs. Since the matter is old and it is a family dispute, the trial court is directed to expedite the hearing and disposal of the suit.

9. The amendment in the written statement will certainly delay the cause of the respondent who is plaintiff before the trial court and therefore though normal practice would be to award cost to the person who succeeds in the petition, in the present case, the cause of the respondent is likely to be delayed and therefore the petitioners shall pay cost of Rs.250/- to the respondent for getting order of amendment in the written statement.

(D.P. Buch. J.)

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